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No. 00-214

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") correctly applied this Court's interpretation of Section 251(c)(3) of the Telecommunications Act of 1996 ("Act") in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), in upholding interconnection agreement provisions that require U S West to combine network elements ("UNEs") upon request.

2. Whether the Ninth Circuit correctly upheld interconnection agreement provisions that require U S West to permit collocation of remote switching units that are "necessary" for new entrants to gain access to UNEs, as provided under Section 251(c)(6) of the Act.

3. Whether the Ninth Circuit properly discharged its judicial review function under Section 252(e)(6) of the Act in determining *de novo* that the challenged agreement provisions ordered by the Washington state commission were consistent with, and did not violate, the requirements of the Act.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, Sprint Communications Company L.P. ("Sprint") states as follows:

Sprint is a wholly-owned subsidiary of Sprint Corporation, a corporation organized for the purpose of engaging in telecommunications and related businesses and is publicly traded under the names of Sprint FON and Sprint PCS. In addition, Deutsche Telekom and France Télécom, both of which have issued publicly traded stock, each own a ten percent (10%) share of Sprint Corporation.

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PRELIMINARY STATEMENT

Respondent Sprint Communications Company L.P. ("Sprint") respectfully opposes the Petition of Qwest Corporation (formerly known as U S West Communications, Inc.) ("U S West") for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

U S West seeks review of the Ninth Circuit's rulings that two "interconnection agreement" provisions approved by the Washington Utilities and Transportation Commission ("WUTC") are lawful under the Telecommunications Act of 1996 (the "Act").[1] One provision requires U S West, which is the incumbent local exchange carrier ("ILEC" or "incumbent LEC") in the state of Washington, to combine unbundled network elements ("UNEs") upon request for a competitive local exchange carrier ("CLEC") ("combinations provision"). Petitioner's Appendices ("App.") at 8a. The other provision requires U S West to allow CLECs to collocate remote switching units ("RSUs") in U S West's network ("collocation provision"). *Id.* at 10a.[2] The WUTC relied on implementing regulations promulgated by the Federal Communications Commission ("FCC") in ordering these agreement provisions. Before the case reached the Ninth Circuit, the FCC regulations on combinations were vacated by the Eighth Circuit and the FCC regulations on collocation were partially vacated by the District of Columbia Circuit. The Ninth Circuit thus interpreted the Act *de novo* in

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[1] Pub. L. No. 104-104, 100 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*).

[2] Collocation "refers to an ILEC's obligation under the [Act] to permit CLECs to install equipment on the ILEC's property in order to connect to the ILEC's existing network." App. at 10a.

reviewing and upholding the agreement provisions. *Id.* at 5a-6a.

A. U S West Challenges Three Separate Interconnection Agreements.

The parties' interconnection agreements resulted from separate arbitrations before the WUTC that were commenced in 1996 between U S West and three CLECs: Sprint, MCImetro Access Transmission Services, Inc. ("MCI") and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). All three interconnection agreements contain a combinations provision. The MCI and AT&T interconnection agreements also contain a collocation provision.[3]

B. The Proceedings Below.

1. The Agreements Properly Require U S West to Combine Network Elements Upon Request.

To facilitate entry of new competitors into local telephone markets, Section 251(c)(3) of the Act requires an ILEC to provide "nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." 47 U.S.C. § 251(c)(3). The FCC concluded that this statutory language requires ILECs to provide UNEs in combined form when requested by a CLEC, and issued regulations implementing that requirement as part of its Local Competition Order. *See* 47 C.F.R. §§ 51.315(b)-(f) (1999) ("Rules 315(b)-(f)")[4]; *Implementation of the Local*

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[3] Sprint supported the collocation provisions as *amicus curiae* before the Ninth Circuit and addresses the issue here as Respondent pursuant to Supreme Court Rules 12.6 and 15.1.

[4] Rule 315(b) prohibits incumbent LECs from separating requested network elements that the incumbent LEC currently combines. Rules 315(c)-(d) require an incumbent LEC to perform the functions necessary

Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15499, 15647-49 (¶¶ 293-297) (1996) ("Local Competition Order").

a. The WUTC And District Court Proceedings.

In the arbitration proceedings before the WUTC, U S West challenged the UNE combinations requirement, arguing that it would permit CLECs to engage in "sham unbundling" by purchasing all of the elements necessary to provide retail services (*i.e.*, "the UNE platform") at cost-based rates rather than at the wholesale rates for the same services when purchased for resale. App. at 113a-115a, 121a-123a, 132a-133a. The WUTC rejected U S West's "sham unbundling" claim and upheld the combinations provisions as consistent with Section 251(c)(3) of the Act. *See, e.g., id.* at 133a ("The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service.").

After the arbitrations were completed, the Eighth Circuit ruled on multiple challenges to the Local Competition Order. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Among other things, the Eighth Circuit invalidated Rules 315(b)-(f), holding that Section 251(c)(3) "unambiguously indicates that requesting

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to combine UNEs, provided such combination is technically feasible and does not impair the ability of other carriers to obtain access to UNEs or interconnect with the incumbent LEC's network. Rules 315(e)-(f) place the burden on the incumbent LEC to prove to the state commission that the requested combination is not technically feasible or would impair the ability of other carriers to obtain access to UNEs or interconnect with the incumbent LEC's network.

carriers will combine the unbundled elements themselves." *Id.* The Eighth Circuit further concluded that the term "unbundled" could only mean physically separated, and held that any rule which imposes a duty on incumbent LECs to provide combinations of UNEs—either by prohibiting them from separating already combined elements or by requiring them to combine elements upon request—would violate the Act. *Id.*

The district court subsequently vacated the combinations provisions. Relying on the Eighth Circuit's interpretation of Section 251(c)(3), the district court held that "[r]equiring ILECs, at cost-based rates, to combine or not to separate already combined network elements violates the Act." *See, e.g.*, App. at 83a (citations omitted).

b. The Ninth Circuit Proceedings.

While the case was pending before the Ninth Circuit, this Court rendered its *IUB* decision. The Court rejected the Eighth Circuit's conclusion that Section 251(c)(3) only allows the leasing of "discrete pieces" of an incumbent LEC's network. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393-95 (1999) ("*IUB*"). The Court also rejected the argument of U S West and some other incumbent LECs that the term "unbundled," as used in Section 251(c)(3), means "physically separated." Section 251(c)(3), this Court explained, "does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form." *Id.* at 394 (emphasis in original). Rather, the Court found that the statutory language was ambiguous. *Id.* The Court upheld the FCC's requirement in Rule 315(b) that incumbent LECs provide access to existing combinations of network elements, finding that the requirement was a reasonable interpretation of Section 251(c)(3) and would prevent incumbent LECs from separating already combined UNEs simply to increase

their rivals' costs. *Id.* at 395. The Court did not address Rules 315(c)-(f) in its opinion.

The Ninth Circuit recognized that Rules 315(c)-(f) were vacated and that it lacked jurisdiction to consider their validity in this action. The Ninth Circuit thus relied on this Court's interpretation of Section 251(c)(3) in determining the lawfulness of the challenged combinations provisions. The Ninth Circuit explained its decision as follows:

> The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. . . . All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not, and we have already so held.

App. at 9a (citations omitted).

2. The AT&T And MCI Agreements Properly Require U S West To Collocate Remote Switching Units On Its Premises.

Section 251(c)(6) of the Act requires ILECs to permit physical collocation of equipment "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). In its Local Competition Order, the FCC interpreted "necessary" to mean "used" or "useful" for either interconnection or access to UNEs, but declined to impose a general requirement that switching equipment must be collocated. Local Competition Order, 11 F.C.C.R. at 15794-96 (¶¶ 579-581). The FCC instead left it to the state commissions to decide on a case-by-case basis whether the

switching equipment at issue would actually be used for interconnection or access to UNEs. *Id.*

a. The WUTC And District Court Proceedings.

In the arbitration proceedings before the WUTC, the Arbitrator recommended that U S West not be required to allow collocation of RSUs, which perform switching functions, in the absence of an FCC regulation requiring it. *See, e.g.*, App. at 120a. The WUTC declined to adopt this recommendation, finding that without RSUs the CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. *See, e.g., id.* at 94a. The WUTC thus determined that "RSUs are equipment necessary for interconnection or access to [UNEs] at the premises of the [ILEC]." *Id.*

The district court upheld the collocation provisions. After noting that the FCC left it to state commissions to determine whether the equipment at issue meets the "necessary" requirements of Section 251(c)(6), the district court concluded that the WUTC's factual finding that RSUs were necessary "was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide." *Id.* at 66a.

b. The Ninth Circuit Proceedings.

In its *IUB* decision, this Court vacated FCC regulations implementing the UNE access standards of Section 251(d)(2). The Court held that the FCC had failed to give proper limiting effect to the statutory terms "necessary" and "impair" in determining which UNEs were subject to unbundled access. *IUB*, 525 U.S. at 387-92. Shortly after that decision, the FCC issued new collocation regulations clarifying that Section 251(c)(6) requires incumbent LECs to permit collocation of any equipment that is "necessary" for either interconnection or access to UNEs, regardless of whether

such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 14 F.C.C.R. 4761, 4776-77 (¶ 28) (1999) ("Collocation Order"). On Hobbs Act review of the Collocation Order, the District of Columbia Circuit held that the FCC's interpretation of "necessary" under Section 251(c)(6) "seem[ed] overly broad and disconnected from [that provision's] statutory purpose," for the same reasons this Court found in vacating the FCC's UNE access standards under Section 251(d)(2). *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000) ("*GTE*"). The District of Columbia Circuit instructed the FCC on remand to refine its collocation equipment requirements "within the limits of 'the ordinary and fair meaning'" of "necessary." *Id.* at 424 (quoting *IUB*, 525 U.S. at 390). Notably, the District of Columbia Circuit did not vacate the entire Collocation Order but preserved the requirement that collocation be provided for equipment that meets the "necessary" standard of Section 251(c)(6). As explained by the District of Columbia Circuit:

> We do not mean to vacate the Collocation Order to the extent that it merely requires [incumbent] LECs to provide collocation of competitors' equipment that is directly related to and thus necessary, required, or indispensable to "interconnection or access to unbundled network elements."

Id.[5]

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[5] On August 10, 2000, the FCC adopted a proposed rulemaking in response to the District of Columbia Circuit's opinion in *GTE*. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, CC Docket No. 98-147, 2000 FCC LEXIS 4208 (Aug. 10, 2000). The FCC has invited comment on the remanded issues, including the meaning

The Ninth Circuit addressed these developments in ruling on the lawfulness of the challenged collocation provisions. The Ninth Circuit recognized that it could not uphold the provisions based on the WUTC's determination that the RSUs were "necessary," because the "necessary" standard (or lack thereof) employed by the FCC in establishing the UNE access guidelines for state commissions had been discredited by this Court. App. at 10a. The Ninth Circuit thus interpreted Section 251(c)(6) *de novo* and held that the collocation provisions were valid under the Act. The Ninth Circuit explained its holding as follows:

> Here, our task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from that process—the provision requiring collocation—has resulted in an agreement that fails to "meet the requirements" of the [Act]. 47 U.S.C. § 252(e)(6). Although the Act may not require the provision, it certainly does not proscribe it. Sections 251 and 252 of the Act are designed to provide some flexibility in fixing the provisions of interconnection agreements. Hence, we conclude that the provision is valid and affirm the district court.

Id. at 11a.

SUMMARY OF ARGUMENT

The first two questions presented in U S West's Petition are premised on the erroneous claim that the Ninth Circuit invaded the Hobbs Act jurisdiction of the Eighth and District of Columbia Circuits by upholding the challenged agreement

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of "necessary" as used in Section 251(c)(6), and will issue revised rules on collocation.

provisions. *See* Petition ("Pet.") at 3-4, 10-19. The Ninth Circuit acknowledged that it lacked jurisdiction under the Hobbs Act to consider the validity of the FCC regulations vacated by other federal courts of appeals. App. at 8a-11a. At the same time, the Ninth Circuit was charged under Section 252(e)(6) of the Act to review the agreement provisions and to determine whether they comported with the Act's requirements. *Id.* at 5a, 9a, 11a. The Ninth Circuit thus interpreted the relevant portions of the Act independently from the vacated FCC regulations, and determined that the challenged agreement provisions complied with the Act's requirements. *Id.* at 9a-11a. Nothing in the Hobbs Act precluded the Ninth Circuit from exercising this review authority under Section 252(e)(6).[6]

U S West further contends that the Ninth Circuit's rulings conflict with the rulings of the Eighth and District of Columbia Circuits vacating the FCC regulations. Pet. at 11. In affirming the combinations provisions, the Ninth Circuit applied this Court's holding in *IUB* that the language of Section 251(c)(3) was "ambiguous" and could be fairly interpreted to prevent anti-competitive conduct. App. at 9a. The Eighth Circuit subsequently held, on remand from *IUB*, that the same statutory language was "plain" and could not be read to require combinations of UNEs. *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000) ("*IUB II*"). Although these holdings reflect a split between the circuits, Sprint

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[6] This Court recently denied U S West's Petition for a Writ of *Certiorari* to the Ninth Circuit in a case upholding similar UNE combinations provisions. *U S W. Communications, Inc. v. MFS Intelenet, Inc.*, 120 S. Ct. 2741 (2000), *reh'g denied*, No. 99-1641, 2000 U.S. LEXIS 4829 (U.S. Aug. 28, 2000). That petition made essentially the same Hobbs Act arguments made here and specifically identified these cases as additional examples of alleged "error" by the Ninth Circuit.

respectfully believes that the Ninth Circuit's analysis correctly followed this Court's interpretation of the Act. Moreover, the Ninth Circuit's ruling involves only the WUTC and four private parties, whereas the Eighth Circuit's decision involves agency rules of nationwide application in a case where the FCC, scores of state commissions, telephone carriers, and other interested parties are present. For these reasons, the latter case is the far more compelling one for this Court to review the combinations issue.

No similar split of authority is presented on the collocation issue. The District of Columbia Circuit partially vacated the FCC's collocation regulations because the agency had failed to give proper effect to the statutory standards prescribed by Congress. *GTE*, 205 F.3d at 422-24. In the absence of a valid regulation, the Ninth Circuit interpreted the statutory standards independently and determined that the collocation provisions ordered by the WUTC were consistent with them. Nothing in the District of Columbia Circuit's decision conflicts with that determination.

In its remaining question, U S West wrongly contends that the Ninth Circuit's ruling gives state commissions unbridled regulatory power to expand upon the duties and requirements imposed under the Act and FCC regulations. Pet. at 20-24. The Act vests regulatory authority in state commissions that choose to participate in the statutory scheme; however, their exercise of that regulatory authority is subject to federal court review. This Court has previously noted that this review scheme ensures that state commissions "hew" the lines drawn by Congress and the FCC in exercising regulatory authority under the Act. *IUB*, 525 U.S. at 378 n.6. The Ninth Circuit properly discharged that oversight function here by ensuring that the agreement provisions ordered by the WUTC complied with the Act's requirements.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT CORRECTLY FOLLOWED THIS COURT'S *IUB* DECISION IN UPHOLDING THE COMBINATIONS PROVISIONS AND ANY REVIEW OF THE ACT'S UNE COMBINATIONS REQUIREMENTS SHOULD BE MADE ON *CERTIORARI* FROM THE EIGHTH CIRCUIT'S CONTRARY RULING IN *IUB II*.

U S West wrongly argues that the Ninth Circuit invaded the Eighth Circuit's Hobbs Act jurisdiction over Rules 315(c)-(f) by affirming the challenged combinations provisions. Because Rules 315(c)-(f) required incumbent LECs to combine UNEs upon request, U S West contends that the Eighth Circuit's vacation of the regulations precludes other federal courts from upholding any similar requirements in an interconnection agreement. Pet. at 11-15.

U S West's argument misapprehends both the scope of the Eighth Circuit's Hobbs Act jurisdiction and the review authority Congress vested in the federal courts under Section 252(e)(6) of the Act. The Eighth Circuit undoubtedly had exclusive jurisdiction under the Hobbs Act to determine the validity of the FCC's regulations in the direct appeal of the Local Competition Order. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a). Even so, the Hobbs Act did not vest the Eighth Circuit with exclusive authority to interpret every provision of the Act addressed in the FCC's regulations. To the contrary, Congress vested the federal district courts with original jurisdiction under Section 252(e)(6) to determine whether the provisions of particular interconnection agreements "meet the requirements" of the Act. 47 U.S.C. § 252(e)(6). Although valid FCC regulations setting forth the requirements of the Act would have binding effect on state commissions and on the district courts in these proceedings, *see U S W. Communications, Inc. v. MFS Intelenet, Inc.*, 193

F.3d 1112, 1123 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000), *reh'g denied*, No. 99-1641, 2000 U.S. LEXIS 4829 (U.S. Aug. 28, 2000), nothing in the Hobbs Act gives a single federal court of appeals authority to interpret the Act's requirements in the absence of such regulations.

The Ninth Circuit understood this distinction and properly exercised its review authority under Section 252(e)(6). After noting that the Eighth Circuit's vacation of Rules 315(c)-(f) was "immune" from collateral attack under the Hobbs Act, the Ninth Circuit limited its consideration to the validity of the challenged provisions of the parties' interconnection agreements. App. at 9a. As the Ninth Circuit explained, Section 252(e)(6) "makes clear that review in federal court is restricted to the determination of whether the terms of the agreement violate any of the Act's requirements." *Id.* at 5a. The Ninth Circuit correctly followed this Court's *IUB* decision, the most authoritative pronouncement of the Act's requirements, in evaluating the combinations provisions challenged by U S West. *Cf. Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (the Supreme Court's construction of a rule of federal law requires every court to give full and immediate effect to that decision in all pending cases); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (same). In restoring Rule 315(b), this Court held that the language of Section 251(c)(3) was ambiguous and could reasonably be interpreted to prevent incumbent LECs from separating already combined UNEs. Indeed, the Court noted that the only reason an incumbent LEC would ever separate already combined elements would be "'to impose wasteful reconnection costs on new entrants,'" and that the FCC was right to prohibit such "an anticompetitive practice." *IUB*, 525 U.S. at 394-95 (citations omitted).

The same competitive concerns identified by this Court in *IUB* support a requirement that incumbent LECs combine UNEs when requested by CLECs. Requiring ILECs to

combine UNEs is simply the "flip side" of prohibiting them from separating already combined UNEs: the only reason an ILEC would refuse to combine UNEs would be to impose unnecessary burdens and costs on CLECs. ILECs routinely combine UNEs and, because they control their networks, can do so much more efficiently than a CLEC. As long as the ILEC is fairly compensated for providing UNE combinations, there is no reason that CLECs should be forced to bear the additional costs, logistical delays, maintenance difficulties, and other burdens of attempting to combine elements on another carrier's network. A CLEC's "combining" costs will always be greater than the "combining" costs for the ILEC, even though the same service is being performed. These extra costs would be pure economic waste borne exclusively by the CLEC.

The Ninth Circuit recognized that the same competitive concerns underlying Rule 315(b) supported the combinations provisions ordered by the WUTC, and concluded that this Court's interpretation of Section 251(c)(3) in *IUB* "makes absolutely clear" that imposing such requirements on ILECs does not violate the Act. The Ninth Circuit had jurisdiction under Section 252(e)(6) to make this determination and correctly followed this Court's *IUB* decision in doing so. For these reasons, the Ninth Circuit's combinations ruling presents no issue that warrants this Court's review.

The Eighth Circuit's subsequent decision on remand from *IUB* creates a split of authority on the proper interpretation of Section 251(c)(3). Despite this Court's holding that the language of Section 251(c)(3) is "ambiguous" and can be reasonably interpreted to prevent anti-competitive conduct, the Eighth Circuit reaffirmed its vacation of Rules 315(c)-(f) on the ground that the "plain language" of the statute must be read to require requesting carriers themselves to "combine previously uncombined network elements." *IUB II*, 219 F.3d at 759. Sprint respectfully submits that the Eighth Circuit's

holding is incompatible with this Court's *IUB* decision and wrongly decided.[7] Sprint understands that the FCC and other parties are petitioning for a writ of *certiorari* to the Eighth Circuit for review of this and other issues decided in *IUB II*.[8] That case is a more appropriate one for this Court to address the split of authority on the Act's UNE combinations requirements. Resolving the issue is of paramount importance to new entrants, who must make informed business judgments whether to lease UNEs or to seek other means of competitive entry. State commissions also need guidance in deciding combinations disputes in ongoing and future interconnection arbitrations. *IUB II* involves FCC regulations with nationwide application, and most telecommunications carriers, all fifty state commissions, the FCC, industry associations, and consumer groups are parties. Review of the combinations question there will afford this Court the broadest perspective of the competing issues and give the greatest number of parties a chance to participate. In contrast, this appeal arises from individual arbitrations involving one state commission and four private parties, and is limited to specific interconnection agreement provisions of two or three years' duration. For all these reasons, the combinations issue should be reviewed by this Court in *IUB II*, not in this appeal.

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[7] Since the Eighth Circuit issued *IUB II* on July 18, 2000, at least one other federal circuit court of appeals and one federal district court have upheld "combinations" provisions based on this Court's interpretation of the Act. *See Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 820-21 (5th Cir. 2000); *U S W. Communications, Inc. v. Hix*, Civ. No. 97-D-152 (consol.), Order (D. Colo. Aug. 25, 2000).

[8] The petitions will be filed on or before October 16, 2000.

II. THE NINTH CIRCUIT PROPERLY EXERCISED ITS REVIEW AUTHORITY UNDER SECTION 252(e)(6) IN RULING ON THE COLLOCATION PROVISIONS AND ITS DECISION DOES NOT CREATE A SPLIT OF AUTHORITY WITH THE DISTRICT OF COLUMBIA CIRCUIT.

U S West also wrongly argues that the Ninth Circuit invaded the Hobbs Act jurisdiction of the District of Columbia Circuit by ruling on the challenged collocation provisions. Consistent with its review authority under Section 252(e)(6), the Ninth Circuit evaluated the collocation provisions in the MCI and AT&T interconnection agreements to determine whether they violated Section 251(c)(6) of the Act. The Ninth Circuit interpreted the statutory requirements *de novo*, affording no deference to the WUTC's interpretation of the Act. App. at 10a-11a. Indeed, the Ninth Circuit recognized that the WUTC had relied on a faulty definition of the "necessary" standard and thus excluded the agency's "decision-making process" from its analysis of the lawfulness of the collocation provisions. *Id.* This review, like the Ninth Circuit's review of the combinations provisions, was properly confined under Section 252(e)(6) and in no way invaded the jurisdiction of the District of Columbia Circuit to review the FCC's Collocation Order under the Hobbs Act.

U S West's claim that the Ninth Circuit's ruling "conflicts" with the District of Columbia's vacation of the Collocation Order is equally flawed. The District of Columbia Circuit remanded the Collocation Order to the FCC because the agency had failed to give proper limiting effect to Section 251(c)(6)'s "necessary" standard for collocation. Even so, the District of Columbia Circuit preserved the Collocation Order "to the extent it merely requires [incumbent] LECs to provide collocation of competitors' equipment that is directly related to and thus necessary . . ." for interconnection or UNE

access. *GTE*, 205 F.3d at 424. The District of Columbia Circuit did not rule that RSUs fail to meet the statutory requirements for collocation generally, much less that the particular RSUs at issue here were not "necessary" within the meaning of Section 251(c)(6). The Ninth Circuit is the only circuit court to consider that latter issue and it did so based on an independent interpretation of Section 251(c)(6) and the evidence presented in the parties' individual arbitrations. App. at 10a-11a. The Ninth Circuit's ruling poses no conflict with—but indeed is expressly contemplated by—the District of Columbia Circuit's partial vacation of the Collocation Order.

There is similarly no basis for U S West to suggest that the RSUs at issue would not qualify for collocation, under revised FCC regulations that give proper effect to Section 251(c)(6)'s "necessary" standard, in circumstances like those presented to the Ninth Circuit.[9] Moreover, U S West may always seek relief by petitioning the WUTC to reopen the interconnection proceedings, should U S West believe that any revised collocation regulations issued by the FCC

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[9] Ironically, U S West argues that the Ninth Circuit's collocation ruling also conflicts with this Court's vacation of 47 C.F.R. § 51.319 in *IUB* for lack of a proper "necessary" standard for UNE access. Rather than advancing U S West's argument, the subsequent history of Rule 319 demonstrates that this type of issue is not appropriate for the Court's consideration. On remand from *IUB*, the FCC reissued Rule 319 based on a more narrow definition of "necessary." Of the seven UNEs listed in the original, vacated Rule 319, six were included in the revised Rule 319. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 15 F.C.C.R. 3696 (1999). Likewise, there is no reason to presume that RSUs will not continue to qualify for collocation, under circumstances similar to those presented here, when the FCC issues revised collocation regulations on remand from the District of Columbia Circuit.

invalidate the challenged collocation provisions. Wash. Rev. Code §§ 80.36.110, 80.36.140, 80.36.330 (2000). Finally, because the FCC's revised collocation rules will govern in any future state commission arbitrations and resulting federal court challenges, a ruling by this Court on the challenged provisions would likely have only limited effect and be quickly superseded by the new regulations. The Ninth Circuit's collocation decision, therefore, presents no issue meriting review by this Court.

III. THE NINTH CIRCUIT DID NOT DELEGATE "UNBOUNDED" FEDERAL AUTHORITY TO THE WUTC IN UPHOLDING THE CHALLENGED AGREEMENT PROVISIONS.

U S West wrongly contends that the Ninth Circuit's decision upholding the challenged combinations and collocation provisions delegates "unbounded and unreviewable" authority to the WUTC to create "federal obligations." Pet. at 20-24. In U S West's view, state commissions may only impose interconnection requirements that are expressly mandated by the Act or FCC regulations, and lack any authority to interpret or implement the Act's requirements in the absence of explicit federal guidelines. U S West similarly argues that the federal courts may only uphold interconnection provisions that are expressly required by the Act or FCC regulations, and must strike any additional obligations imposed by a state commission even if they do not violate "some specific statutory prohibition." *Id.* at 22.

U S West's arguments are unfounded and fundamentally mischaracterize the respective roles that Congress established for state commissions and the federal courts under the Act. As this Court noted in *IUB*, the Act is a valid exercise of Congress' constitutional authority under Article I, Section 8 of the Constitution (the "Commerce Clause") and preempts state regulation of local telecommunications to the extent

provided under the statutory scheme. *IUB*, 525 U.S at 381 n.8 ("Congress, by extending the [] Act into local competition, has removed a significant area from the States' exclusive control."). Although Congress could have exercised its constitutional power to preempt the states completely from the field of local telephone competition, Congress instead created a "decidedly novel" statutory scheme of shared federal and state authority. *Id.* at 385 n.10. Congress vested the FCC with primary responsibility for promulgating regulations to implement the substantive provisions of the Act. *Id.* at 384-85. The Act then grants to state commissions, on a voluntary basis, authority to arbitrate disputes among incumbent LECs and CLECs over the Act's requirements and to approve or reject interconnection agreements. 47 U.S.C. §§ 252(b), (c), (e). Where a state commission chooses to assume this regulatory authority, it must follow the dictates of the Act and the FCC's implementing regulations. *IUB*, 525 U.S. at 378 n.6. The state commission may also impose additional requirements under state law, provided they are not inconsistent with the Act or FCC regulations. *See, e.g.*, 47 U.S.C. §§ 252(e)(3), (f)(2).[10] The FCC purposefully adopted "*minimum* requirements" in the Local Competition Order with the expectation that state commissions would "impose additional pro-competitive requirements that are consistent with the Act and our rules." Local Competition Order, 11 F.C.C.R. at 15534 (¶ 66) (emphasis added). Finally,

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[10] The Act contains several provisions that expressly preserve or grant states and state commissions the authority to impose and enforce state law requirements and obligations beyond those set forth in the Act and the FCC regulations. For example, Section 251(d)(3) prohibits the FCC from issuing regulations that preclude enforcement of "any regulation, order, or policy of a State commission"; Section 254(f) permits states to adopt universal service regulations; and Sections 261(b) and (c) permit states to enforce existing and promulgate additional regulations.

Congress vested the federal courts with jurisdiction to review state commission determinations in interconnection proceedings to ensure that the statutory requirements are satisfied and that any additional obligations imposed by the state commissions do not violate the Act. 47 U.S.C. § 252(e)(6).

The statutory scheme disproves U S West's contention that "[s]tate regulators . . . may impose *only* those conditions that are required by federal standards." Pet. at 20 (emphasis added). State commissions have "plenary authority" under the Act to impose terms and conditions in interconnection agreements based not only on the statutory provisions and FCC regulations, but also compatible state law. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 208 F.3d 475, 479-81 (5th Cir. 2000) ("*Southwestern Bell*"). This Court described the statutory scheme in similar terms, noting that it is a means by which "Congress has broadly extended its law into the field of intrastate telecommunications, [while leaving] the policy implications of that extension to be determined by state commissions." *IUB*, 525 U.S. at 385 n.10. The state commission's authority under the Act—while "plenary"—is not "unbounded and unreviewable," as U S West wrongly contends. Federal court review under Section 252(e)(6) ensures that if "a state commission is not regulating in accordance with federal policy [the federal courts] may bring it to heel." *Id.* at 378 n.6.[11] Although the Act is silent as to the applicable standard

[11] Congress provided additional checks to ensure ultimate federal review over state commission determinations by prohibiting state court review of state commission actions in approving or rejecting interconnection agreements, and by requiring the FCC to preempt the state commission's jurisdiction in any proceeding in which the state commission "fails to act to carry out its responsibility" under Section 252. 47 U.S.C. §§ 252(e)(4)-(5).

of review under Section 252(e)(6), virtually all federal courts, including the Ninth Circuit in this case, have reviewed state commissions' interpretations of the Act and the FCC's regulations *de novo*, according no deference to the state agencies' interpretations of federal law.[12] *AT&T Communications of Va., Inc. v. Bell Atl.-Va., Inc.*, 197 F.3d 663, 668 (4th Cir. 1999); *Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 227 (D. Del. 2000); *AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998); *U S W. Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997).

The shared state-federal scheme established under the Act, while novel, has been critically important in implementing Congress' goal of rapid competition in local telephone markets. As this Court observed, the Act's interconnection requirements are not a "model of clarity." *IUB*, 525 U.S. at 397. State commissions have had to interpret and apply these requirements in hundreds of individual arbitrations involving a wide range of different carriers and varying local market conditions. Numerous issues have arisen that are not expressly addressed in the Act or the FCC's regulations, and some of the FCC's regulations have been vacated in the midst of these proceedings. This has required state commissions to resolve countless disputes based on their own interpretations of the Act's pro-competitive requirements, without any

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[12] Because state commissions are not "agencies" as defined by the Administrative Procedure Act, the standards provided by that act are not directly applicable. *See* 5 U.S.C. § 701(b)(1) (defining agency as an "authority of the Government of the United States"). Absent a statutory command, general standards for judicial review of agency action apply. "A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) (citation omitted).

controlling guidance from the FCC. *See, e.g., U S W. Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1121-22 (D. Colo. 1999) (upholding liquidated damages provisions to prevent anti-competitive conduct); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637, at *21-*24 (W.D. Tex. Aug. 31, 1998) (ordering unbundling of dark fiber and subloops before the FCC issued revised Rule 319 requiring these elements). The history of this case, as the Ninth Circuit recounted, was "punctuated" by "the subsequent history of the Eighth Circuit litigation" in *IUB*, and illustrates the type of changing legal landscape that state commissions have faced. *See* App. at 6a. Yet, under U S West's restrictive view of the Act, state commissions would be paralyzed from acting in such situations in the absence of a governing FCC regulation. This approach would be manifestly unworkable and would thwart the efforts of state commissions to open local markets to competition. Although U S West's interests may be served by such a result, it is not supported by the statutory scheme. Congress instead provided for federal court review of the state commissions' determinations to ensure that the Act's pro-competitive goals are properly implemented.

In this case, the Ninth Circuit properly discharged its judicial review function under the Act. The Ninth Circuit reviewed *de novo* the challenged combinations and collocation provisions ordered by the WUTC and determined that they did not violate the requirements of the Act. The Ninth Circuit based its determinations on the Act -- and, in the case of combinations, this Court's interpretation of the Act in *IUB*. The Ninth Circuit did not delegate "unbounded" authority to the WUTC; to the contrary, in reviewing the challenged collocation provisions, the Ninth Circuit expressly excluded the WUTC's decision-making process from its analysis. Had the Ninth Circuit determined that the challenged agreement provisions violated the Act, the Ninth

Circuit would have stricken them and remanded the issues for further proceedings consistent with the Act's requirements. *Cf. id.* at 11a-12a (remanding shared transport issue to ensure that the relevant agreement provisions complied with the Act and revised Rule 319). Although U S West disagrees with the Ninth Circuit's conclusions, the decision represents a conventional exercise of Section 252(e)(6) review authority and in no way expands the WUTC's regulatory powers under the Act, when properly construed.[13] The Petition thus presents no issue worthy of this Court's attention.

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[13] At least two other circuit courts of appeals have held that the proper standard of review is not whether the Act expressly requires the challenged provision, but whether the interconnection agreement violates the Act. *See Southwestern Bell*, 208 F.3d at 483-84 (state commission determination that reciprocal compensation obligations encompass ISP-bound traffic "does not conflict with the Act or with any FCC rule regarding such traffic"); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 572 (7th Cir. 1999) ("our task is to examine the [state commission] order . . . to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation"). These decisions, like the Ninth Circuit's, properly construe the nature and scope of the state commission's regulatory authority under the Act and further demonstrate that U S West's "unbounded delegation of federal authority" argument has no merit.

CONCLUSION

For the foregoing reasons, U S West's Petition for a Writ of *Certiorari* should be denied.

Respectfully Submitted,

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